STATE OF MICHIGAN

COURT OF APPEALS

ALFRESH BEVERAGES CANADA CORPORATION, Plaintiff-Appellee, v GARDEN FOODS, INC., Defendant-Appellant.	UNPUBLISHED March 21, 2006 No. 264901 Wayne Circuit Court LC No. 04-435204-CK

Before: Owens, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order of judgment awarding plaintiff $64,811.43 pursuant to a contractual indemnity clause. The judgment was entered after the trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Facts

Defendant and Fairlee Fruit Juice Limited (Fairlee), a Canadian corporation, entered into the underlying agreement (hereinafter "the Fairlee agreement"). Pursuant to the Fairlee agreement, which commenced on May 1, 2000, Fairlee agreed to manufacture and package defendant's fruit juice products and defendant was required to supply Fairlee with specific ingredients and materials necessary to manufacture the product. Defendant further agreed that the supplies it provided would comply with all applicable laws and that the labels it provided would also properly describe the product and comply with applicable Food and Drug Administration (FDA) regulations. Defendant also agreed to defend and indemnify Fairlee against any claims arising out of defendant's breach of the agreement.

Fairlee subsequently sold its operations to plaintiff, which continued to manufacture and package defendant's products. Later, Everfresh Beverages, Inc. and Faygo Beverages, Inc., sued plaintiff in federal court claiming that the product labels on defendant's juice products violated copyright and trademark laws. Within two weeks after this lawsuit was filed, plaintiff notified defendant of the action and demanded that defendant assume its defense and indemnify it pursuant to the Fairlee agreement. Defendant refused to do so. Plaintiff subsequently filed this action for breach of contract to recover attorney fees and costs incurred in defending itself.

The trial court ruled that plaintiff was entitled to indemnification by defendant under the Fairlee agreement. On plaintiff's subsequent motion for entry of judgment, the trial court entered judgment for $64,811.43, the full amount plaintiff sought.

II. Analysis

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Defendant first argues that the trial court should have considered Canadian law in interpreting the indemnity provisions of the Fairlee agreement. Defendant raised this issue for the first time in its motion for reconsideration and, on appeal, asserts that, if Canadian law applies, the assignment "may not have been valid." But, as in the trial court, defendant merely speculates, without citing any specific law, that the application of Canadian law may have affected the outcome of this case. As such, we consider this issue abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Next, defendant argues that plaintiff could not rely on the indemnity provision of the Fairlee agreement because plaintiff was not a party to that contract. We disagree.

"An indemnity contract is construed in the same fashion as are contracts generally." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). The main goal of interpreting a contract is to honor the parties' intent. *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Id.* at 159. "If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

The Fairlee agreement provided: "This agreement may not be assigned by either party, by operation or law or otherwise, without the prior written consent of the other. Such consent shall not be unreasonably withheld" It is well established, however, that contractual terms may be modified or waived. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370-371; 666 NW2d 251 (2003). "[A] modification or waiver can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract." *Id.* at 372. Here, the evidence established conduct between Fairlee, plaintiff, and defendant that demonstrated a waiver of the provision requiring written consent for an assignment. There is no dispute that defendant knew that Fairlee sold its operation to plaintiff who, in Fairlee's place, continued to manufacture and package defendant's juice products. Defendant did not object to the assignment, but rather, continued the business relationship with plaintiff, which stood in Fairlee's place. Despite defendant's assertions to the contrary, this evidence clearly and convincingly demonstrated a waiver of the assignment provision's writing requirement. As such, the trial court did not err in determining that there was no genuine issue of material fact regarding whether the Fairlee agreement was assigned to plaintiff.

Defendant argues, in the alternative, that it and plaintiff modified the terms of the Fairlee agreement. In support of this argument, defendant relies on a letter written by its employee, Sal Landa, in which he stated, "As per our agreement, we will absorb the cost of this faulty product in lieu of any and all attorney fee's owing to your law firm that is representing you in the [federal litigation]." However, defendant's owner, Chaker Aoun wrote, in response to Landa's letter, proposing a different resolution or "tentative" agreement. Subsequently, plaintiff's attorney wrote to defendant's attorney indicating that the parties were still dealing with each other regarding the "indemnification issue, and hopefully that issue can be resolved in the near future." Defendant also relies on affidavits from Landa and Aoun who attested in identical terms that, at a meeting between the parties, an agreement was reached whereby, "[i]n lieu of any and all attorney fees incurred by [plaintiff] for the lawsuit pending . . . , [defendant] agreed to absorb the substantial cost of faulty product produced by [plaintiff]" and further, that "[e]ffective September 4, 2001, [defendant] would take over the appointment of all attorneys and would be responsible only for the attorney it appointed." However, summary disposition cannot be avoided by conclusory assertions that are at odds with the parties' actual historical conduct. *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). On the basis of the evidence presented, there is no genuine issue of material fact as to whether the Fairlee agreement was modified; this evidence clearly demonstrates that, while discussions and negotiation occurred, the parties did not modify the Fairlee agreement.

Defendant also argues that it was not required to indemnify plaintiff in the federal action because defendant did not breach the terms of the Fairlee agreement. In the federal action, it was claimed that the labels on plaintiff's products violated copyright and trademark laws. Defendant does not contend that the labels complied with these laws. Rather, it contends that the agreement required only that the labels comply with Canadian law and FDA requirements. We disagree.

The Fairlee agreement provided, in relevant part:

> 11. Representation and Warranties of Garden:
>
> (i) Garden represents and warrants to Fairlee that the supplies provided by Garden pursuant to this Agreement shall comply with all applicable laws.
>
> (ii) Garden represents and warrants to Fairlee that any label designs provided by Garden to Fairlee hereunder shall properly describe the product to be packaged hereunder in accordance with the specifications and such labels and packaging will comply in all material respects with the applicable FDA regulatory bodies.

The agreement also provided generally that defendant would supply "specific necessary ingredients and materials required to manufacture" its products.

Defendant first contends that its labels were only required to comply with Canadian laws. We disagree. While the agreement contained a provision indicating that it would be governed and construed in accordance with Canadian laws, this was a general provision related to the construction of the contract. Paragraph 11, however, is a specific provision related to supplies and materials provided by defendant. We read contracts as a whole. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005). Specific provisions in

a contract normally override general provisions. *Id.* Therefore, according to paragraph 11(i), defendant agreed that its supplies would comply "with all applicable laws."

Defendant also argues that the labels had to comply only with the requirements of the second clause and not with "all applicable laws," as specified in the first clause. The second "representation and warranty" clause specifically requires label designs to conform to FDA regulations and provide a proper description of the product. Clauses in a contract should be harmonized if possible, and a contract should not be interpreted so as to render it unreasonable. *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982). The provisions can be read together, to wit: supplies must conform to all applicable laws and labels must additionally conform to FDA regulations and properly describe the product. Any other construction would be constrained and unreasonable. Therefore, no genuine issues of material fact exist with respect to whether defendant breached the Fairlee agreement.

Defendant next argues that plaintiff failed to take the requisite steps to enforce the indemnification provision in the parties' December 2001 agreement. As discussed above, the Fairlee agreement required defendant to indemnify plaintiff in the federal litigation. This litigation was already underway when the parties entered into the December 2001, agreement. Defendant, who had been named a defendant in that litigation, clearly had notice. With regard to the requirement that plaintiff give defendant control over the defense and settlement negotiations, the evidence, and the nature of this case in general, clearly demonstrate that, although plaintiff demanded that defendant assume its defense, defendant refused to do so. Thus, defendant's assertion that plaintiff failed to give defendant control is without merit.

Defendant finally argues that the trial court erred in entering a judgment for "attorney fees and costs as damages without a trial of evidentiary proofs." In support of this issue, defendant merely states that, because it filed a jury demand, it was clear error for the trial court to enter the judgment on the damages without having conducted a jury trial. Defendant then cites *Sherman v Marathon Oil Co*, 192 Mich App 625; 481 NW2d 816 (1992), stating that the standard of review is clear error. Defendant states nothing further and cites no other law in support of its position. Because defendant has not properly argued the merits of this issue, we deem it abandoned. *Houghton*, *supra* at 339-340.

Defendant also argues that the trial court entered the judgment without conducting an evidentiary hearing and without proper proof of reasonableness of the fees. However, these issues were not raised in defendant's statement of the issues presented. Therefore, they are not properly presented on appeal. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Nonetheless, our review of the lower court record reveals that, after plaintiff moved for entry of judgment and submitted proofs supporting the requested damages, defendant did not request a jury trial or an evidentiary hearing. Rather, defendant contested the damages claimed and specifically requested that the trial court reduce the judgment according to the calculations defendant presented. Accordingly, the record reflects that defendant waived its earlier demand for a jury trial, which was filed with its answer to plaintiff's complaint.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood